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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DANIEL CHESLER, MATTHEW KANG, CHRISTINE AND NICHOLAS MESSINA, and JANINE LOVUOLO, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

HYUNDAI MOTOR AMERICA, INC. and KIA MOTORS AMERICA, INC.,

Defendant.

No. 8:15-cv-01988-AB-MRW

PLAINTIFFS' OPPOSITION TO DEFENDANT KIA MOTORS AMERICA, INC.'S REQUEST FOR JUDICIAL NOTICE

Date: June 27, 2016
Time: 10:00 a.m.
Place: Courtroom 4
Judge: Hon. André Birotte, Jr.

I. ARGUMENT

A party requesting judicial notice bears the burden to show that the documents in question are properly the subject of judicial notice. *See Harris v. Gipson*, 2015 WL 5999255, at *1 n.3 (C.D. Cal. July 21, 2015). Defendant Kia Motors America, Inc. ("Kia") requests that the Court take judicial notice of the contents of certain Owner's Manuals. Yet, for the reasons discussed below, Kia fails to show that judicial notice is proper here.

A. Kia Has Not Shown that the Contents of the Proffered Owner's Manuals Are Beyond Reasonable Dispute Based on Their Source

Under Federal Rule of Evidence 201(b)(2), the court may judicially notice a fact that is "not subject to reasonable dispute" in that it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see also United States ex rel. Modglin v. DJO Global Inc.*, 48 F. Supp. 3d 1362, 1379 (C.D. Cal. 2014). As the Advisory Committee notes to Rule 201 state, "*[a] high degree of indisputability is the essential prerequisite*" for a court to take judicial notice of a particular fact. Fed. R. Evid. 201 (advisory committee notes) (emphasis added).

Plaintiffs in this case dispute that the cited Owner's Manuals come from sources whose accuracy cannot reasonably be questioned—and Kia fails to show otherwise. A party with an interest in the outcome of a case "is not a source whose accuracy cannot reasonably be questioned." *Loumena v. Kennedy*, 2015 WL 5963988, at *8 (N.D. Cal. Oct. 13, 2015); *see also Turnacliff v. Westly*, 546 F.3d 1113, 1120 (9th Cir. 2008) (ruling that a former employee declarant "is not a source 'whose accuracy cannot reasonably be questioned'"); *Star Varga v. United Airlines*, 2009 WL 2246208, at *5 (N.D. Cal. July 24, 2009). For the same reason, district courts are very reluctant to take judicial notice of materials linked to party websites, since they generally "are not the sorts of 'sources whose accuracy cannot reasonably be questioned.'" *Azco Biotech, Inc. v. Qiagen*, 2013 WL 4500782, at *3 n.5 (S.D. Cal. Aug. 20, 2013); *see* *also Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1030-31 (C.D. Cal. 2015) (same).

Here, too, it would be inappropriate to take judicial notice of the contents of the proffered Owner's Manuals simply because Kia says that dealerships may make the manuals available upon request. In essence, Defendant—a party of interest in this case—cannot show that its own employee is a source whose accuracy cannot reasonably be questioned (and the Sauck Declaration itself goes blatantly beyond the bounds of judicial notice).[1] Accordingly, this Court should decline to take judicial notice of the Owner's Manuals submitted by Kia.

B. Kia Has Not Shown that the Proffered Owner's Manuals Have Been Incorporated by Reference into the Operative Complaint

Under the doctrine of incorporation by reference, the Court may consider on a Rule 12(b)(6) motion documents whose contents are alleged in the complaint, "provided the complaint 'necessarily relies' on the documents or contents thereof, the document's authenticity is uncontested, and the document's relevance is uncontested." *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1240 (N.D. Cal. 2014); *see also United States ex rel. Modglin*, 48 F. Supp. 3d at 1383 (rejecting incorporation by reference where relators' claims did not rely on documents at issue). Stated another way, district courts should not incorporate a document by reference unless it is "*integral*" to the operative complaint and "*there are no disputed issues as to the*

[1] Kia's case cites do not support their Request for Judicial Notice. In *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1140 n.1 (N.D. Cal. 2013), the plaintiffs did not oppose judicial notice, and in fact, the plaintiffs expressly referred to Apple's terms of service in support of the complaint, which terms were part of the disputed purchase. In *Gertz v. Toyota Motor Corp.*, 2011 WL 3681647, at *3 (C.D. Cal. Aug. 22, 2011), the plaintiffs alleged a breach of warranty claim based on terms contained in the owner's manual at issue there. And, in *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1003 (N.D. Cal. 2012), the court merely took judicial notice of product labels that formed the very basis of that complaint. But here, Plaintiffs object to judicial notice, and importantly, Plaintiffs *do not allege* claims based on Kia's owner's manuals. Furthermore, Kia's employee declarant (Eric Sauck) is a technical employee who does not even attest that he created the manuals or actually provided them to Plaintiffs (just that dealerships were allowed to make the documents available to consumers upon request).

document's relevance." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (emphasis added). "[T]he mere mention of the existence of a document is insufficient to incorporate the contents of a document." *Id.*; *see also United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (defendant's petition to the DEA was not incorporated by reference where it was not *referenced extensively* and it was not *integral* to defendant's claim).

Incorporation by reference is particularly inappropriate in a deceptive marketing case where the plaintiffs have not alleged that they were misled by the documents at issue, or even saw the documents, prior to purchasing the product. *See Missud v. Oakland Coliseum Jt. Venture*, 2013 WL 812428, at *11 (N.D. Cal. Mar. 5, 2013). In that case, the complaint does not *necessarily rely* on the documents and the documents are not *integral* to plaintiff's claim. *See id.* (finding that the contents of defendant's webpages were not centrally related to plaintiff's claim for deceptive marketing where plaintiff neither alleged that he was misled by those webpages nor that he saw them prior to purchasing the concert tickets at issue).

Kia contends that Plaintiffs have incorporated the cited Owner's Manual excerpts by reference into the operative complaint "because the FAC purports to make broad allegations about all of Kia's documents about which the Plaintiffs are aware." Kia RJN at 2. Kia is wrong. Plaintiffs do not refer to Owner's Manuals in the operative complaint, and they certainly do not do so *extensively*.[2] The cited manuals are simply *not integral* to Plaintiffs' claims, since Plaintiffs do not allege that they were misled by the manuals or even exposed to them before purchasing the Affected Vehicles. *See Missud*, 2013 WL 812428, at *11; *see also Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 795 (N.D. Cal. 2011) (rejecting incorporation by reference of

[2] There are limited references to "pre-sale" materials in the operative complaint, by which Plaintiffs were *not* referring to owner's manual materials. By definition, "owner's" manuals are a reference tool for "owners"—not prospective purchasers. Common experience also confirms that a reasonable car purchaser does not review an owner's manual prior to purchase.

certain Help Center pages on Facebook since "it does not follow that a member would necessarily see the other Help Center pages Facebook submits"). Consequently, the operative complaint does not necessarily rely on the manuals, and the Court should not consider such materials on a motion to dismiss.

In any event, Plaintiffs dispute the relevance of the cited Owner's Manuals. As noted above, Plaintiffs do not allege that they saw the cited Owner's Manual materials before purchasing their Affected Vehicles. Furthermore, the Owner's Manuals are not the sort of pre-sale marketing materials that Kia used to induce purchase of the Affected Vehicles.

In sum, incorporation by reference would be improper here because the operative complaint *does not necessarily rely* on the Owner's Manuals, the manuals are *not integral* to Plaintiffs' claims, and regardless, Plaintiffs *dispute the relevance* of the Owner's Manuals at issue.

II. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court to deny Kia's request for judicial notice as to the cited Owner's Manuals.

Dated: April 18, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ Steve W. Berman
STEVE W. BERMAN